No. 2598

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH DISTRICT

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

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I

STATEMENT OF THE CASE.

This was an action brought by the plaintiffs, as the husband and son, respectively, of the deceased Nettie Ennis, to recover damages for her death, caused by the negligence of the defendant Railway Company. The son was thirty years of age and self-sustaining, living in Chicago away from his mother, who was forty-nine years of age and lived with her husband, one of the plaintiffs, who was fifty-nine years of age, on their homestead near Bainville, Montana (Tr. p. 61; 70-71). As in such an action the damages are limited to the pecuniary loss, clearly under this evidence the action is legally,

practically, brought only for the benefit of the husband, and hereafter, for convenience, the action will be so characterized, and he will be designated as the plaintiff.

(A)

GENERAL OUTLINE

In the original complaint it was alleged that the defendant Railway Company placed, and negligently permitted to remain, on a certain public highway crossing over its right of way near Bainville, Montana, the carcass of a horse, which was an object likely to frighten horses, and that thereafter the deceased wife was riding in a buggy attached to a team of horses being driven by John Bigelow, a horseman and driver employed on the ranch, and that the horses took fright at the carcass and ran away, throwing her out of the buggy and inflicting injuries from which she died (Tr. p. 26-29).

When a trial was had on this complaint, the plaintiff was unable to prove that the way in question was a public highway, and a variance was about to arise in the middle of the plaintiff's proof. Whereupon, the plaintiff, accepting and abiding by the ruling of the court, took a continuance in order to amend his complaint at his request "by striking from the complaint the allegation that the crossing was a public highway and by inserting in lieu thereof allegations showing that Nettie Ennis was using said crossing at the invitation of the defendant" (Tr. p. 293).

Thereupon plaintiff's amended complaint was filed and pleaded that defendent invited the deceased to use the roadway (Tr. p. 26). Defendant moved to strike portions of this complaint on the ground that the plaintiff still was alleging that the roadway was a public highway (Tr. p. 36-40), and in the argument thereof the plaintiff disclaimed any intention to claim that the roadway in question was a public highway (Tr. p. 40), and accordingly the court allowed said amended complaint to stand as alleging that the roadway "was a way by invitation, acquiescence or license" (Tr. p. 41-42).

A demurrer was then sustained to this complaint (Tr. p. 48-53), on the ground that no violation of duty was shown if the way was a mere invited way, and thereupon a second amended complaint, the one in question now, was filed, which returned to the old theory and alleged that the way in question was a public highway by estoppel and by dedication (Tr. p. 7-14). It was on this theory that the action was finally submitted to the jury—that on the basis of an invited way or way by license there would be no liability (Tr. p. 234), but plaintiff did not claim this, but claimed it was a public highway by estoppel (Tr. p. 218).

When this complaint was filed, thus returning to the old disproved, abandoned theory of the existence of a public highway, defendant again moved to strike portions thereof (Tr. p. 45-59), on the ground that it was now clear that plaintiff intended to assert that the roadway was

a public highway, and on the ground that the question as to whether the roadway was a public highway by being regularly laid out, by dedication, or by estoppel, or otherwise, was included in the allegation of the first complaint that the roadway was a public highway, and that at the previous hearing the plaintiff failed to prove this, and acquisced in the court's ruling that he could not, under the then existing pleadings, recover, unless he could prove this, formally advised that he could not prove this way a public highway, and elected to abandon that allegation and to amend his complaint "by striking out the allegation" aforesaid, and by alleging that the roadway was one used by invitation or license. That, therefore, the question as to whether or not the way in question was a public highway was a matter which had been litigated between the parties, but the plaintiff thereafter, finding later that he had no cause of action on the theory of an invited way, was now seeking again to litigate the question of a public way, from which he was foreclosed by the privilege of amendment and continuance obtained at the previous hearing, upon his electing to abandon that trial and to abandon his allegation of a public way, as hereinbefore recited (Tr. p. 49-55), but the court denied the motion to strike and thus permitted the plaintiff to revert to his old theory that the way in question was a public highway, at any rate by estoppel (Tr. p. 59). This is the first error which we urge.

The action was thus one where damages were

sought by reason of defendant placing and negligently leaving a carcass near a highway which was likely to cause a runaway, all of which the defendant knew, or should have known, whereby a team did run away, *the driver thereof being "without knowledge that said carcass would cause said team to run away"* (Tr. p. 12).

Defendant pleaded a general denial and contributory negligence (Tr. p. 16-20) on general grounds, and also because, if defendant was negligent, the driver knew of this negligence and thrusting himself upon it, had the last clear chance to avoid this negligence, and the resulting accident, and hence defendant's negligence was not a cause, but a mere condition of the accident (Tr. p. 18-20).

This feature of non-liability (at least a question of fact for the jury, because plaintiff's case illustrated the rule that one who has the last clear chance to avoid an accident is deemed the cause thereof, and that a person cannot recover who, present, has thrust himself on a condition created by the negligence of an absentee) is important, as it was one ground of the motion for a non-suit (Tr. p. 130-131), which was overruled (Tr. p. 131), and of the request for an instruction to return a verdict for defendant (Tr. p. 201).

Moreover, in this connection the court overruled defendant's objections to the court's instructions, on the ground that they did not cover this issue (Tr. p. 235), and the court refused instructions covering this issue (Tr. p. 203-207 Request-

ed instructions IIA to IIE), and held that it was not an issue in the case (Tr. p. 223-225). For convenience, we will call this the issue as to whether defendant's negligence was the cause of the accident.

These defenses were denied by plaintiff in his reply (Tr. p. 21-22) and a trial was had (Tr. p. 60-238) and a verdict returned (Tr. p. 23) for $8000, on which judgment was entered (Tr. p. 24), and a writ of error (Tr. p. 266-267) was sued out to review this judgment and brings up for review the following errors:

(1) The error of the court in permitting plaintiff to amend his complaint so as to proceed on the basis that the road in question was not a mere invited way, but a public highway by estoppel. This error has already been outlined.

(2) The error of the court in overruling the demurrer to the complaint upon which the action was tried (Tr. p. 15) and in overruling the objection to the introduction of evidence, because the complaint did not state a cause of action (Tr. p. 61), and in overruling the motion for a non-suit, and in refusing a peremptory charge. All these proceedings will be argued under the heading which indicates the basis thereof, to-wit: No negligence shown.

(3) The refusal of the court to charge that under the proof, to the effect that the plaintiff and the driver had for some months known of defendant's negligence, if any, and might easily have avoided the same, such negligence was not

a cause of the accident, and the court's overruling the objections to the court's charge on the ground that it did not cover theis issue. These errors will be urged under the heading, "Defendant's Negligence not a Legal Cause."

(4) Errors in evidence, such as (a) the ruling of the court denying the offers to prove that the driver was habitually given to the use of intoxicating liquor to excess, as affecting his contributory negligence (Tr. p. 79, 136, 139); (b) the refusal of the court to allow defendant to withdraw a question asked the driver at the last trial, as to whether he had ever said it was a piece of paper, and not the carcass, which frightened the team and caused the runaway (Tr. p. 93-95); (c) the court's later refusal of defendant's efforts to show that the driver had made such inconsistent declaration)Tr. p. 132-136; 143); (d) the court's permitting the driver's testimony at a previous trial to be read in evidence, without the absence of the witness having been sufficiently accounted for (Tr. p. 81-94); (e) the error of the court in permitting a witness, Mrs. Charles Allison, to testify for the plaintiff as to deceased having conversed after the accident as to the cause thereof and her not having said anything about the driver having had liquor (Tr. p. 102-103); (f) the error of the court in refusing to allow the rehabilitation of the witness John Lundquist on redirect examination (Tr. p. 185); and (g) many rulings made on the evidence in the course of the trial, too numerous to

assign separately, and the misconduct, we think, of the court throughout the trial which operated to the prejudice of the defendant, whereby also defendant's witnesses were confused, plaintiff's counsel compelled to make meaningless objections, defendant's counsel hampered in the examination of witnesses and defendant's defenses ridiculed before the jury—certainly repeatedly commented upon unfavorably and improperly—by the court, so that the verdict represents rather the temporary judgment of the court in the condition of the court's mind at the time, forced upon the jury, rather than any deliberate judgment of the jury.

This last assignment of error is set forth in detail in the specification numbered XII, and is set forth pursuant to an exception to the court's conduct taken at the end of the trial (Tr. p. 198). It will be necessary, of course, to outline the same in detail and therefore the brief may be somewhat prolonged, but we will undertake this task at this time.

(B)

MISCONDUCT OF THE COURT.

Let us bear in mind that this is a case where the horses were said to have taken fright by reason of the appearance and smell of the carcass. The answer, as stated, denied these issues, and pleaded contributory negligence in great detail, as required by the rules of pleading embodied in the local Montana decisions.

These being the issues, the plaintiff himself

had, by his testimony, sought to establish his case (Tr. p. 61 to 78), when defendant, in the cross-examination of the plaintiff, sought to bring out its defense of contributory negligence by showing that the driver was under the influence of intoxicating liquor. It was at this time that the court, *suddenly*, and without reason or excuse, lost control, and first started on its course of hostility to the defendant, and from the time of this sudden and abrupt beginning, defendant, even in its three respectful and earnest (Tr. p. 152, 158, 194, 198) pleadings with the court, was not thereafter able to restore the judicial equilibrium.

(A) On Defense of Contributory Negligence.

The cross-examination was continuing and there was no objection before the court. Suddenly the court interrupts the examination and asks if there is any plea of contributory negligence (Tr. p. 78). The court, in its opinion, censures us for calling attention to this action, remarking, in its opinion, that this constitutes a clear challenge of its right on its own motion, to confine the evidence to the issues.

We are, however, emphasizing this matter by reason of the fact that this action by the court, which we mean respectfully to designate as an interruption, constitutes the beginning of the later trouble, and should be scrutinized from that point of view. Let us bear in mind also that the answer definitely states that it sets forth two separate defenses, each separately

stated and conspicuously numbered. Also the averments of the answer embrace less than four pages (Tr. p 16 to 20) and two of these are taken up with a narrative of the ultimate facts showing contributory negligence (Tr. 18 to 20). A moment's glance would, therefore, have shown that negligence was pleaded in detail.

The question asked by the court (Tr. p. 78) also was not whether the specific fact of intoxication was pleaded—pleading evidence—but whether there was any plea of contributory negligence at all.

Again, on being advised that there was such a plea, and although a moment's glance at the answer would show that this plea embraced almost the greater part thereof, the court hypothetically declined to recognize that there is any such issue, and says that *evidence as to any intoxication of the driver is not "worth while going into,"* but on counsel again advising that there is such an issue, the court recedes (Tr. p. 78-79). Little progress was, however, made, when an objection was made that defendant's questions as to the driver being under the influence of liquor were directed to a time too remote to show intoxication at the time of the accident, and that the proof should be confined to evidence of his incapacity at the time of the accident. The court thereupon, in effect, overrules the objection as made but returns to his former position, and excludes the evidence on a ground which counsel for plaintiffs did not have the temerity to advance, and rules that

there was *no issue of contributory negligence* "as the court sees it." (Tr. p. 79-80).

We dwell upon this, as stated, because it marks the sudden beginning of the trouble which then developed. The cold reading of the transcript shows perhaps merely a ruling by the court on a matter of law, and the manner of the court, of course, cannot be reproduced in print, and is, therefore, lost to us, but we emphasize that the interjection was made by the court of its own motion, its ruling that contributory negligence was not an issue was erroneous, and the plaintiffs were not themselves supporting the court or agreeing with the court in this matter, or denying the validity of the defendant's assertions that the matter was in issue.

Defendant thus had difficulty in getting this proof as to the condition of the driver into the case, but it appears that the plaintiff had no such difficulty, for, after voluntarily attempting to confine the plaintiff's proof to what the court considered were the issues, and after having ruled, without objection by the plaintiff, that there was no issue of contributory negligence, or of intoxication, we find that the plaintiff, without any interruption by the court, is allowed, through the witness, Mrs. Charles Allison (Tr. p. 100), to testify that Bigelow, at the time of the accident, "was perfectly sober." She was cross-examined on this (Tr. p. 101). Again, Mrs. Katy Meinhardt was allowed to testify for the plaintiff that

Bigelow "was perfectly sober," and that "there was no sign that he had been drinking at all" (Tr. p. 109-110), and she also was cross-examined on this (Tr. p. 111).

Summarizing the plaintiff's case, therefore, it seems that the defendant's efforts to consider this proper issue were met by voluntary interruptions by the court, not sustained by the plaintiff, excluding the proof, but when the *plaintiff thereafter made the issue of intoxication an issue* in the case, there was *no objection by the court.* This is particularly important in the light of the court thereafter, in defendant's case, as will be shown, still prohibiting defendant from making this proof.

Defendant, really to meet plaintiff's own proof, afterward, in its own case, sought to establish the driver's condition at the time of the accident, by proof of settled habits and a question on this point was objected to by plaintiffs on general grounds. The court sustained the objection and directed defendant to "Write your offer of proof if you think it will do you any good," thus before the jury (in the light of the fact that the court later changed its mind and admitted part of the testimony) stating in effect that defendant was trying to introduce improper proof, and that whatever proof might be introduced on this matter would not, in the opinion of the court, "do any good." (Tr. p. 136). It is reasonable and probable, in the light of the court's entire conduct, that the jury understood the remark of the court as a reflection upon the

defendant's proof. The court then adds: "We will give you time. *It is not admissible under the issues in this case"*; thus again repeating its ruling that there was no issue of contributory negligence (Tr. p. 136 to 137), although, let us emphasize again, a moment's impartial glance at the answer would have convinced the court of its error and plaintiff had still in these three instances, refused to join in the court's error, and the whole matter had already been made an issue by plaintiff's proof.

On the offer of proof being made the plaintiff objects to the same on the ground that habit is too remote, and finally, and apparently more under compulsion induced by the court's demeanor, reluctantly includes the court's objection that the evidence was not admissible under the issues, which objection the court sustained (Tr. p. 136 to 137).

Again, by another written offer in the examination of another witness, these facts were sought to be elicited by defendant on this matter of the condition of the driver, which offer was also denied (Tr. p. 139 to 140), and finally defendant sought to prove the driver's condition in the Town of Bainville at the time he started to drive back to the ranch only four miles away, and perhaps not more than one-half an hour before the accident. Here again, even before any question directly involving this matter was before the court, and again without any objection of that nature being made by the plaintiffs and although the court had allowed the plaintiff

to cover this fully in his own case, the court, by way of anticipation, rules that the defendant could not show, as a part of its case, the condition of the driver, even that near to the time of the accident.

The witness was asked: "Did you see yourself where he (the driver) went during the morning in question just before returning to the ranch?" He answers: "Well, I was naturally meeting him around my place." Counsel's objection then only went to the word "naturally," but the court says: "Of course the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant."

As stated, the question actually propounded at that time did not directly involve the matter ruled upon by the court, and accordingly, lest the court's ruling be deemed hypothetical, and as a step necessary in the preservation of the plain error thus involved in the mere anticipatory ruling of the court, the defendant asks the witness directly:

"What was his (the driver's) condition at that time (just before starting for the scene where the accident occurred) relative to sobriety or intoxication?"

Plaintiffs' counsel, now entirely under the moral compulsion of the court, induced by the court's repeated refusal to recognize validity in objections actually made by the plaintiffs, and its repeated reiteration, without such objections

being made by the plaintiffs, that such evidence was not an issue, again is compelled to adopt the court's view, and now again urges that the condition of the driver was "entirely" independent of any issue in the case. Though the issues raised in the answer are then clearly outlined to the court by the defendant, the court sustains the objection thus forced upon the plaintiffs and rules "There is no issue as to the intoxication of the driver" (Tr. p. 141).

An offer of proof would, therefore, be necessary in order to present this error, and, in a proper effort at the same time to withhold from the jury the nature of the excluded proof, thus no longer proper for them to consider, defendant requested an adjournment in order to write out certain offers of proof, and, as considerable time would elapse in writing out the offers, an adjournment was taken near the noon hour to enable the defendant to write out its offers on this and other matters (Tr. p. 141 to 142).

Upon court reconvening, though the court had three times ruled, by way of anticipation, that the evidence was not admissible, and though the court had compelled, as we think, plaintiffs' counsel finally to contend that the evidence was "entirely" beside the issue, plaintiffs' counsel is unable longer to have the temerity to follow the court in this plain error and accordingly withdraws the objection and concedes the plain admissibility of the testimony.

The court also, now taking the same view and realizing the extent of its error, attempts to

correct this error on the law and rules that evidence is admissible as to the condition of the driver on the morning of the accident. However, this change in the court's attitude was not, perhaps unnecessarily, accompanied by any frank admission or recognition of the validity of defendant's rights, with the intention of thereby removing any improper impression gained by the jury, but, on the contrary, in defining its changed attitude and its ruling that defendant's questions relating to the condition of the driver at the time were proper, did so in a manner which we think led the jury to believe that the evidence was admitted, not as of right, to the defendant, but rather by the grace of the court, a condition in the court's attitude which from this time on marked the reception of all of the defendant's evidence.

The court said: *"If you have anything in relation to that at all* you may proceed," from which remark the jury may have understood that the court meant to indicate, we think, a sort of anticipatory lack of credence in any testimony along these lines, and the court's action seemed to carry the possibility of it conveying a warning to the witness not to incur the court's displeasure in any testimony which the witness might be about to give on a matter which the court had thus for so long forbidden defendant from rebutting (Tr. p. 142 to 143).

Plaintiff was also alive to the impression being created before the jury by the court's attitude even in correcting its own error, and remarks

that the defendant (by its efforts, finally successful, to avoid a glaring error in the record) has been "harassing" the court, and the court, far from stating that defendant's conduct has been apparently to the advantage of the court and all concerned, rather, we think, applauds plaintiff's view (Tr. p. 142 to 143), and disclaims any knowledge of any effort having yet been made on the part of the defendant to show the condition of the driver at that time, although the last question was expressly asked on this matter and the adjournment was expressly taken to enable the defendant, by an offer of proof, to preserve this error. (Tr. p. 143.)

Defendant thereupon, after disposing of its offers on other matters, proceeds to inquire of the witness as to the condition of the driver at the time in question (Tr. p. 144 to 145). Two things are operating on the witness: First, the court's unfriendly attitude to this proof would discourage any witness from thus running counter to the court, and secondly, an interview by one of the plaintiffs as a neighbor and friend during the noon recess (Tr. p. 148 to 149).

Accordingly, after the adjournment the witness says first: "I cannot tell you exactly what condition he was in." He is clearly reluctant. He is seeking to evade an unpleasant duty. In defendant's silence, he adds: "He was in my place of business." Asked by the defendant to go ahead and state all the facts bearing on his condition he says: "Well, I should judge that I knew that Jack was taking a drink or two.

I know that. I saw him take a drink or two. That is all I can state. He took one or two with me." The reluctance of the witness to testify having been shown, the defendant is forced to weaken the anticipated testimony by edging nearer to the subject and witness says: "He was not drunk. What I mean by drunk is that he was not staggering around." He continues slightly to resist examination by talking generally, without exactly describing his condition. He hesitates and defendant reluctantly suggests that the witness should not hesitate to tell whatever he knows, and thereupon the witness, still averse to giving a conclusion, narrates the saloons he and the driver visited (Tr. p. 145-146).

Not having yet been willing to testify directly in response to the questions propounded or as to the condition of the driver, the witness is then asked to describe the driver's condition in the language of the street, and the court sustains an objection that the language of the street is "incompetent," and although plaintiffs' counsel, appreciating the difficulty of getting facts from a reluctant witness, saw no ground of objection because defendant was now reluctantly being compelled to venture towards, but carefully keping off of, the ground of leading questions, the court again ignores the objection as made and remarks: "This man has been liquor dealing and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk *without being urged strongly.*" (Tr.

p. 145 to 146). Finally the witness answers, "Well, as near as I can describe it, I would put it this way. He was not drunk, but feeling good. That is about as close as I can come to it."

In its last effort, now necessarily direct, defendant asks whether the witness had not, out of court, described the driver's condition as "just short of a good start for a spree," and the witness pertinently replies, in describing his condition, "Well, if he was feeling good, I suppose if he had stayed there, why naturally he would have wound up in a spree." Thereupon the court again without any motion to strike, or other matter being before it for ruling, remarks critically: "You will have to explain to the jury where the man started from (Tr. p. 146 to 147).

The witness not having directly answered the question, it is repeated ("Was that the expression you used to me that he was just short of a good start for a spree?"), and the question, as a question to refresh a witness' recollection, is objected to "as immaterial," on the ground that the plaintiffs "were not there to keep track of the witness," and the court sustains the objection. An offer of proof is necessarily made accordingly and the court rules, according to the bill of exceptions as prepared from the stenographer's notes and settled and signed by the court: *"I don't see that it would enlighten the jury any if he did see him drunk."* This is later corrected by the court after the settlement of the bill (Tr. p. 147) so as to strike out the

word "drunk" and substitute the words "at that stage." In any event the comment was, we think, improper.

The cross-examination of the witness then revealed one apparent cause of his reluctance, in addition to his fear of incurring the court's hostility, for the transcript shows that during the recess, he had been interviewed by one of the plaintiffs.

In his cross-examination he was confused by two questions being propounded to him at the same time for purposes of impeachment, one of which was an erroneous narrative of his testimony (Tr. p. 148). His attempted answer to one of these questions thus propounded at the same time was directly responsive, yet he was censured by plaintiffs' counsel for not responding, and defendant's effort to protect him in his rights does not meet with any approval from the court (Tr. p. 148). Out of the confusion finally emerges a statement by witness that during the recess he had told the plaintiff that, as to whether the driver was drunk or sober, he was not positive, and that it was so long ago that it was pretty hard for him to recollect the condition the driver was in, but witness knew that the man had some drinks (Tr. p. 148 to 149).

In his cross-examination the witness was frank though the examination was severe and the questions confusing. Defendant's counsel, not being sure of the scope of the answers and gathering that from the cross-examination, there

might be some inconsistency, sought, on redirect, to review the witness's cross-examination, and give him an opportunity to make any explanation of any inconsistency if he desired. On objection being made counsel advised the court that the question was propounded in part in order to clear up a confusion or misunderstanding in the mind of defendant's counsel as to the meaning of the cross-examination, but the court declined to permit it, remarking "I don't think the jury is in any doubt about it" (Tr. p. 151 to 153).

Counsel offered also to get from the witness any explanation as to any possible inconsistency in his testimony, but the court declined to allow it, thus leaving the jury, perhaps sharing counsel's confusion, since the cross-examination in the record shows that there was no real or substantial conflict. If the witness had, however, stated on redirect that he recognized no inconsistency, that what he meant at all times was that he was not positive exactly as to whether the man was drunk or on the border line, but that he did know that the man was feeling good, or words to that effect, the confusion might have been clarified. This might have been the testimony of the witness, but the court would not permit "rehabilitation on redirect examination," or explanation to be elicited by even the most indirect questions.

Thus it was that throughout the trial on the issue as to the intoxication or impaired condition of the driver's mental faculties, the defendant

was repeatedly hampered by the court's action, sometimes involving positive errors, never corrected, sometimes involving errors which the court corrected in, we think, an entirely ungracious manner, leaving an impression with the jury that defendant's evidence was admitted almost entirely by the grace of the court, sometimes involving matters of form resting in the discretion of the court, with the discretion always unnecessarily exercised adverse to the defendant. The court's manner was, we think, always hostile and severe, hampering counsel and discouraging the witnesses. Many of the court's rulings were on the border line of discretion and error: possibly today only a few instances are sufficiently serious to constitute reversible error as a single ruling, but certainly as a result of the combination thereof the jury were undoubtedly prejudiced against this phase of defendant's case.

But, not content with these remarks in the course of the trial, as to the driver's condition, the court, in its charge, commented on this phase of the case as follows:

"In reference to that (the contributory negligence of the driver) all the court has heard in the way of evidence is that Bigelow had been drinking that day. A drink or two seems to be all the direct evidence. Possibly you would say one drink is all that is actually proven, but it is for you to say because the witness Hubener was defendant's witness and if he is in doubt you have the right to take the most favorable view of the evidence for the plaintiffs. There is other evidence that witnesses smelled liquor on

Bigelow's breath; one saw a bottle in his pocket. It would be a fair inference that it was a bottle of liquor of some kind. There is not much evidence from which you might infer negligence on the part of Bigelow; at the same time the court will leave it to you to say."

"In my opinion the evidence of contributory negligence would be very slight, but you are not bound by that opinion. You have the right to infer it from the fact that Bigelow had some drinks, but *I imagine most men take a drink or two occasionally.*" Tr. p. 223 to 224).

The court thus says that the evidence of Bigelow's being at all under the influence of liquor was slight, yet the witness Hubener, though a friend of the plaintiff himself, with the Hubener and Ennis families intimate, says that Bigelow was feeling good when he left town, and the witness Torqueson, a disintersted witness, who was present at the scene of the runaway, says he smelled liquor on the driver's breath (Tr. p. 166 to 167), and John Lundquist, a banker, lumberman, general country merchant and rancher of that community, noticed a bottle in the driver's inside vest pocket, immediately after the accident (P. 179). And the whole subject of intoxication was of sufficient importance to justify the court at the very close of the plaintiff's case, again of its own motion, to ask the plaintiff, on a subject not discussed by the plaintiff in re-opening his case, whether, an hour and a half after the accident, when the witness first saw the driver, the driver was then under the influence of liquor (P. 197).

And finally, in its opinion, on the petition for

a new trial, the court completely reverses itself and says that "there was no denial that the driver drank." It will be noticed, however, that in the case as presented to the jury, plaintiff's witnesses denied that there were any signs that he had been drinking and the driver himself testified in his testimony, read in evidence, that he had not been drinking any that day (Tr. p. 93).

Lastly, though the driver, charged with the responsibility of having the safety of the wife of his employer entrusted to his care, in the management of his horses so far violates that trust as to drink intoxicating liquor while on duty, this conduct, repeatedly the subject of adverse comment in any suit involving negligence in the handling of horses, is (unless we are stating the matter unfairly or too critically) *glossed over by the court on behalf of the plaintiffs* with the statement that "everyone takes a drink or two," an attitude, we believe, which tended to minimize the driver's fault.

(*B*) *The Carcass Did Not Cause the Runaway.*

The second defense related to the carcass as an object likely to frighten horses by reason of the odor said to be given forth by it, or by reason of its position. The plaintiff seemed to take the position that it was the odor from the carcass that seemed to make the trouble (P. 68 to 69, p. 74 and 84). The plaintiffs' witnesses had testified that on several occasions they had passed by and their horses had been

frightened to some extent. Defendant was endeavoring to show the contrary.

For this purpose the witness Provost was called. The transcript shows (Tr. p. 161 to 162) the extent that he was worried by the court's prior demeanor. Uncertainly, after having testified that he used the crossing, he testified that he could not recall any particular use he had made of the crossing near where the accident happened at the time of the accident. To refresh his recollection and to remind him of his statements out of court that at the time he was seeding a tract of land near the crossing, which necessitated his using the crossing daily with horses at that time, he was asked whether there was any reason why he would cross at that time, more than at any other time. This is objected to as *"immaterial"* and *the objection is sustained.* (Tr. p. 155). The court's rulings are unfriendly and generally adverse. At any rate the objections and rulings are so numerous as to impede progress. Defendant tries to get the facts without reminding the witness, each question being objected to, and finally the question is asked as to what time seeding would take place there, but the entire effort, either most indirectly or directly, to refresh the recollection of the witness is subjected to a running fire of objections sustained by the court, though it is inconceivable that any of them were well taken.

As an example of the extent to which this criticism is justified by the transcript, we note the following:

"Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?"

Objection: "We object to that as *leading and suggestive.*"

"*Objection sustained.*" Tr. p. 156.)

Let us bear in mind that this witness is shown by the transcript to have been affected by the court's attitude to such an extent that on cross-examination, when asked whether he was not a "standing witness" for the Railway Company, dazed, he answered "Yes," though proof showed that he had never been a witness except in a single instance, at which time he was an eye-witness (Tr. p. 161 to 162). The witness knew the Ennis horses and was asked to describe the skill necessary to handle them, but this was *objected to as "incompetent, irrelevant and immaterial," and the objection was sustained.* The driver Bigelow had testified by deposition that the horses were as gentle as kittens, and to bring out the antithesis the witness was asked whether "you could say that those horses could be described as kittens," but on objection that this was not "competent or material," the court rules adversely and on an offer of proof being made, the court rules ambiguously and impatiently that this is not competent, but that the witness might describe what he knows of the horses (Tr. p. 157 to 158). The witness is then asked whether he would call the animals bronchos, and this question is objected to as leading. The transcript shows

that something had happened which made the witness's answers short and confusing, and that counsel for defendant was surprised and was leading only because necessary and partly to advise the court of the anticipated proof, in order that the court would admit the same. When the court, however, sustains the objection on the ground that the question was leading, a most reprehensible habit, counsel endeavors to excuse this action on the ground that the leading of the witness has been necessary, but the court rules that no argument is wanted. The court having thus ruled in the presence of the jury that the defendant was guilty of reprehensible conduct in asking a leading question, counsel is about to apologize for this seeming misconduct and to assure the court that the leading question was propounded in good faith, but the court, not permitting this, interjects, without, we think, any justification, a severe reprimand in the presence of the jury for thus merely endeavoring to explain to the court that the propounding of a leading question was not intentional misconduct and was undertaken only because deemed proper ad necessary by counsel in order to elicit any testimony from the witness (Tr. p. 158). That the reprimand thus administered in the presence of the jury was unnecessary is perhaps illustrated by counsel's immediate apology to the court (Tr. p. 159), necessarily accompanied, however, by a respectful request for an exception to the court's remark.

The court then sustains every objection to any question to refresh the recollection of the witness, or meet the surprise of counsel. The witness is asked:

"Did you describe those horses as rather wild and hard to handle?" To avoid incurring displeasure at the hands of the court the question is in fact broken up by a sounding of the court's view as to its propriety. Such a question is objected to as "hearsay, leading and immaterial," though the conduct of the driver in handling the horses was directly in issue. The court nevertheless sustains the objection, but says that in the event surprise is claimed, or if it is desired to refresh the recollection of the witness, the testimony is admissible; otherwise not (Tr. p. 159). Unable to understand the ruling in that the objection was sustained counsel makes an offer accompanied by an acceptance of the court's view that leading was necessary to refresh the recollection, and by reason of surprise, and then the court reverses itself and again sustains an objection that the offer was "immaterial and irrelevant" (Tr. p. 160). Defendant then gave up further examination.

On the same subject the witness John Lundquist, who was a merchant, banker and rancher, drove to the scene of the accident over the very crossing in question as soon as the accident occurred. He testified that the carcass did not bother his horse and was not in a condition to bother horses. He is severely cross-examined, and he endeavors to answer as a layman

would answer. He is asked whether there was any decomposition in the flesh at all. He answers "there was not as bad decomposition as there would be if the flesh had rested there in the warm weather of summer." The answer was directly responsive. Counsel improperly reprimands him, with no disapproval of the court, on the ground that this responsive answer was not responsive. "I don't care how it would be; I am asking was there any at all." The witness answers, "I never noticed any." Still not content with the examination counsel asks again, "You would not say there was or was not?" (Tr. p. 180-181).

The witness has answered every question, and, pressed on by another question, endeavors as a layman will to ascertain what is intended and to cover the same. He answers, as a conclusive effort to express his views, "No, I would not. I know there was nothing said about any smell that day." The answer in the first three words was directly responsive and the last represented merely a layman's effort to grasp the situation and meet it, and yet counsel rebukes the witness and asks him to answer the question, though the witness has done so, and the court, *without protecting the witness to the extent that he had answered* the question, sustains plaintiffs throughout, and *reprimands the witness.*

"Yes, don't volunteer any information."

Note that the court does not call attention to the fact that the objection as made was not well

taken, but that a motion to strike out part of the answer might be sustained on the ground that the witness had answered the question and then had added more, which the court would chose to declare volunteered. The court's ruling is entirely in favor of the plaintiff and against the witness and is accompanied by a sharp rebuke for mere unintentional, natural, technical misconduct of a layman as a witness (Tr. p. 181). The effect on the jury could not have been but adverse.

Lastly, on this subject, the defendant called its section foreman, who would have occasion to go over his section daily from Bainville easterly to and beyond the crossing. The defendant desirous of showing the duties of the foreman and his opportunity for observing the condition of the carcass and the fact that it could not give out odor or scare horses, sought to have the foreman describe the very limited length of his railroad section and therefore his increased opportunities to be familiar with the crossing in question, but without objection being made, the court curtails the examination and *rules as a matter of fact that the foreman's duties would cover too much ground to enable him to testify* on the matter at issue—the very fact which the defendant wished to disprove, and adds in substance that the defendant must content itself with a mere statement from the witness as to whether or not the carcass gave forth any odor, and that the defendant could not show in its own case that the opportunities of the witness

for observation were good. That this could be done only by the plaintiff "if the plaintiff wants to examine him." Says the court:

"You needn't go into details. If the plaintiff wants to examine him he can. All his duties would cover too much ground for this particular purpose" (Tr. p. 190 to 191).

The effect of this ruling was that the defendant was not allowed to show the duties of the section foreman bearing on his opportunities to observe, but as to such important matters to the defendant, the defendant would have to run the chance of the plaintiffs cross-examining or not cross-examining the witness, and the court practically left the defendant high and dry in this proof by stating in the presence of the jury that the section foreman's duties would cover too much ground to make his testimony of any avail, a fact which we were endeavoring to disprove, and particularly hinting to the plaintiff the lack of any necessity for cross-examination on this matter.

Counsel, startled at *a ruling that a witness may not supplement his direct testimony by proof of his opportunity for observation,* and fearing that he misunderstands the court, asks the witness to describe his duties as section foreman, and, on objection being made, explains the purpose of showing opportunity to observe, but the court, harsh and severe, reiterates its rulings and says:

"Never mind; bring it right down to the crossing, and if the transaction is not specified with

sufficient particularity that can be brought out on cross-examination. Prove what he knows about the conditions at this crossing" (Tr. p. 191).

Seeking to conform to this ruling, whatever it meant (are we exaggerating or discourteous if we call it a mere angry ruling?) counsel asks:

"Do you recall any fact which would show your ability to observe whether or not there was any odor from that carcass?"

Objection: "We object to that as being incompetent, immaterial, irrelevant and *leading and suggestive.*"

Frankly, but with entire respect to the district judge, we must state that the fact is that the court was temporarily beside itself in its opposition to defendant's case, and these meaningless objections were not made by the plaintiff willingly, but only because the court is insisting upon some support in its actions. The court meets this effort to conform to its ruling by adverse comment: "You have asked him in infinite detail now" (the transcript shows a page and a half of direct examination) and the court seemingly reflects upon the witness's testimony by adding: "He has said there was no odor; now I think that serves your purpose," a remark which we think approaches dangerously near being misunderstood by the jury as a severe reflection and criticism on the testimony of the witness and not as a ruling on a matter of law (Tr. p. 192).

The defendant next desired to show by the

witness that a very few days before the accident he and his crew stopped right at the crossing and spent an hour there, eating dinner within a few feet of the carcass, and no odor was noticed, though manifestly a person would not eat dinner in a locality such as this was claimed by the plaintiff to be. Defendant's efforts to get this testimony were met by objections of no merit, on which the court ruled ambiguously and harshly. Finally the testimony was admitted but only after the court had rebuked defendant's witness, harassed defendant's counsel in sustaining captious objections and in making rulings impossible to be understood, which also the court refused to explain, and finally ridiculing the proof and admitting it, saying that the testimony was not of the slightest importance.

Thus the witness testified that he stopped on the crossing shortly before the accident. In the light of the fact that a most general question has been objected to as leading and the objection sustained, defendant now asks:

"What did you stop there for?"

This is immediately objected to as "immaterial," and the court sustains the objection. Desperate, the defendant offered to prove that the witness and his crew in the week before the accident stopped on the crossing within a few feet of the carcass and noticed no odor. The court ruled ambiguously: "You can ask why he stopped there (the very question last propounded); ask him how long he stopped there" (Tr. p. 192.) Counsel, unable to understand the

ruling, inquired hesitatingly whether the offer was denied, and is met by an eager "Oh, yes," when the record shows that in fact the offer was not denied.

Counsel for plaintiff, fearing the record, but hesitating to withdraw all objection, lest the court's displeasure be incurred, stated: "I have no objection to his showing that he was there a week before and that he crossed there." The court then adds in impatience: "The court has indicated that he may do so. There is a limit to these matters of detail." (The examination has lasted for only a page and a half of the transcript excluding objections.)

Counsel then asks, in line with plaintiffs' permission, how long the witness stopped on the crossing on the occasion referred to, and the witness, instead of answering by a specification of the precise number of minutes, describes the length of the stop by a reference to an event, and says he stopped there during the dinner hour—"I and my crew eating dinner there." The answer, though not specifying the minutes or seconds, is entirely responsive as indicating the length of the stop, but the court, without any objection, *rebukes the witness*: "You are asked how long you stopped there at that time," and the witness answers: "An hour" (Tr. p. 193).

Defendant next desired to show that the witness as foreman, in looking for gravel, had occasion to use a horse, riding around the country, and daily, sometime prior to the accident, rode over this crossing in going and

returning in his work in looking for gravel. Accordingly he was asked: "When you would look for gravel, what conveyance did you use?" This is immediately objected to as "immaterial." The materiality would not appear directly from the question, for the reason that the question was very general, but this form was apparently necessary, since the most indirect and general questions had been repeatedly objected to as leading and the court had sustained the objections. Counsel for defendant did not even dare to more than scarcely approach the subject in hand, and, worn out by the course of the trial, appeals respectfully to the court: "Will your Honor trust me in this particular this time?" but the court only scolds and comments harshly and improperly on the witness's former testimony, and handles questions of fact for the jury as decisions of law to be made by the court as to the weight of the evidence:

"The trouble is you make too hard work, your examination; too much detail. This matter of his traveling and *stopping there for dinner is not of consequence.* It was enough for him to stop there that long, without stopping there for the purpose of eating his dinner" (Tr. p. 194).

Finally the witness is permitted to testify that he searched for gravel on horseback, and in doing the work, daily rode over the crossing and his horse was not bothered by the carcass.

A last, but minor matter, is found at the end of the court's instructions where defendant necessarily in the presence of the jury, objects

to the instructions on the ground that they did not cover the fact that the driver knew of the conditions, whatever they were, at the crossing, and would therefore owe a duty to avoid any negligence of defendant, but the court, whose only function, we think, in its view, was to overrule the objection, remarks to counsel in the presence of the jury: "By placing the carcass there you cannot foreclose him from using that road."

(*C*) *Miscellaneous Matters.*

In the third place, there were a great many miscellaneous instances, not particularly important in themselves, but merely illustrating the course of conduct of the court throughout the trial. They serve to explain and give character to the above more serious action, and to show that, though only a few of them involved positive error, possibly only three were technically reversible error, the court's discretion was always exercised against the defendant, where propriety and a desire, not unduly to hamper or embarrass counsel, would have prompted rulings in favor of defendant, but the rulings of the court in the presence of the jury were harsh and accompanied by improper comment. Indeed, it was the court's action, we think, which so often forced upon the plaintiff the necesity of making objections.

As an example of one of these miscellaneous rulings, we will refer the court to the proceedings regarding the testimony of the driver Bige-

low. He had testified at a previous hearing and was not called as a witness at the instant trial. Accordingly plaintiff sought to introduce in evidence, by way of a deposition, his testimony at the former hearing (Tr. p. 81). It appeared that at the former hearing the defendant, not having impeaching testimony, was forced to sound the witness by cross-examination, to see whether he would concede that any impeaching testimony existed. He was accordingly asked whether he had ever made inconsistent statements to the effect that it was a piece of paper, and not the carcass, which caused the runaway. Plaintiff objected, at the former hearing, on the ground that the question was not a proper impeaching question, but on our disclaiming laying the foundation for impeachment, the court overruled this objection, and the witness denied that he had ever made any such inconsistent statement (Tr. p. 93).

In the light of this history of the former hearing, defendant at this trial affirmed that the witness Bigelow should be called, because his absence had not been sufficiently accounted for, and because defendant now had impeaching testimony, which theretofore it could only guess at, and defendant advised the court that it desired to withdraw said disclaimer and withdraw those questions, unless the court would permit impeachment, but the court not only ruled that in the absence of a proper impeaching question (which, in view of the absence of the witness, and the change in the conditions, could not now,

and could not at the former trial, have been propounded), impeachment would not be allowable, but also that, though conditions had changed, so that defendant no longer desired to sound the witness on cross-examination for impeaching testimony, the question and answer thus sought to be withdrawn by defendant, in the light of the changed conditions, could not be withdrawn. The court accordingly, as a part of the cross-examination, permitted the witness (over defendants' objection and withdrawal) to testify that he had always told the same consistent story.

Manifestly, in the light of the above history, the defendant was entitled to withdraw the question and could not have the question forced upon it at the trial with the changed conditions.

Again, if it was to be admitted at plaintiffs' instance, over defendants' objection, it would constitute, not cross-examination, but substantive testimony introduced by the plaintiffs at the plaintiffs' instance, and defendant was entitled to rebut the same, but the court also declined to permit the same to be rebutted (Tr. p. 94). In spite, therefore, of the changed conditions, *the court forced upon the defendant a question,* improper under the changed conditions, declined to permit defendant to withdraw the same, and after the same was read favorably to plaintiff, and at the plaintiffs' instance, forbade defendant from contradicting the same (Tr. p. 132 to 135; p. 143 to 144; p. 163).

The presentation of this matter at the trial

and the outlining to the court of the above history of the case in the course of the proceedings necessarily consumed a little time, and the court, in finally ruling that plaintiff was entitled to force the question upon the defendant, said, in regard to defendant's request to withdraw the question:

"The court will not permit it. *Now we will hear what the witness has to say* and bring that (the contradiction thereof) up later" (Tr. p. 95);

thus indicating, we think, to the jury that as the result of the court's ruling, defendant had been thwarted in an effort to exclude competent testimony, but through the court's efforts "now," at last, "we will hear what the witness has to say," which defendant has so carefully endeavored to withhold. Later, when defendant sought to avail of the court's ruling, that the question of the right to rebut this testimony would be taken up when in its own case, defendant might seek to introduce such evidence, defendant, in offering proof as to inconsistent declarations by Bigelow, thus at the invitation of the court, renewed its contention that Bigelow's absence had not been sufficiently accounted for, and again called the court's attention to the fact that the above testimony had been forced into the case by the court not permitting the defendant to withdraw the question. The court's remarks, made in the presence of the jury, indicate some lack of faith in the sincerity of counsel's position, and now contain a direct hint as to what

should be the jury's final action in regard to defendant's defenses.

Says the court:

"*You disclaimed* any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. *You expressly said* it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is not the fault of the other side. *Even the best cases*" (to say nothing of the case of the defendant in this instance) "*are sometimes lost* because testimony cannot be produced" (Tr. p. 133 to 134).

It seems to us that the above ruling of the court constituted actual error. Clearly defendant was within its rights at the first hearing, and, not having impeaching testimony, and in the light of the driver's testimony in regard to the piece of paper (Tr. p. 85, 89, 91 and 92), to sound the witness on cross-examination to see whether the witness would state to the jury instances, if any, where he had made inconsistent statements. This is not impeachment, but is sounding the witness on cross-examination for facts which almost he alone may know, and no foundation is here necessary: (State v. Burrell, 27 Mont. 282, 70 Pac. 982).

But when, at the next trial, the defendant had impeaching testimony it was entitled, nay, it was its duty, to advise that the disclaimer was no longer true, and therefore it was entitled, nay, it was practically its duty, to withdraw the question.

Again, when the court rules that the question

and answer can thus be forced into the case, this should be at most as testimony introduced by the plaintiff and not as a part of the cross-examination, and in that event the plaintiff making it an issue and competent evidence, the defense was entitled to rebut it.

In this connection we would call the court's attention to the remarks of the court in its written opinion, where *the court says* that in the course of the trial defendant *made repeated demands that the plaintiff perform a miracle* of instantly producing the witness, who was not in the state. The transcript shows that Bigelow's absence was accounted for by the plaintiff merely by the fact that at the time of the trial he was not in Montana but probably over the Dakota line (Tr. p. 81). Where he was at the time the case was set for trial, or whether he was sent to Dakota by the plaintiff or whether his stay in Dakota was to be but temporary, was not revealed. Accordingly, objecting that the inability to call Bigelow was not shown by the mere fact that on the day of trial he was in Dakota, defendant, to preserve its rights, made formal "demand" that the witness be produced by the plaintiff. The court overruled this. Later, when that part of his testimony containing his negation of the existence of impeaching testimony was read, counsel again objected, frankly advised that impeaching testimony was available, renewed its "demand," to preserve its rights, that the witness should be produced for the purpose of impeachment, and the court

ruled that counsel should bring that up later. Thus, pursuant to the invitation of the court, counsel did "bring that up later," and then in its opinion the district judge characterizes this as repeated demands made by us that the plaintiff perform a miracle, whereas, in fact, it was merely a statement made to insure the preservation of defendant's rights to urge error in the premises.

As another miscellaneous example of the court's unfriendly action, at the close of the case and after the court had overruled a motion for a nonsuit, counsel, sounding the court for its views on an important issue of law in the case as to the responsibility for the negligence of the driver, says:

"I do not know what your Honor's views as to the law are, but if your Honor desires any authority as to the principle that the negligence of a driver of a private vehicle is imputed to the occupant, I can cite to your Honor a Montana authority"; to which *the court remarks.*

"Oh, everybody knows that."

Statements such as these, made in the presence of the jury, especially when repeated time and again, cannot but affect a jury adversely. Yet all defendant did was to sound the court respectfully on a proposition as to which there is some conflict in the authorities, a proposition also at least sufficiently worthy of consideration as to be the subject of careful opinions by our own Supreme Court and by the courts of other states.

Again, the witness John Lundquist testified for the defendant at this trial. An effort was made to discredit him by showing bias in favor of the Railway Company, in that he shipped goods "a little" over the defendant's railroad, there being no other railroad available to him. He was not on the best terms with the railroad. He had a lawsuit with the railroad once which he won, and he had claims still pending which the railroad had declined to pay, and he feels that he has been compelled to give them up (Tr. p. 181 to 182). If any of this was discrediting (at least that was the object of the testimony) defendant was entitled to show that no bias existed. Accordingly defendant showed on re-direct examination that the witness appeared pursuant to a subpoena. Next defendant asked whether the witness had not attended at the last trial as a witness for the plaintiffs, but the court sustained an objection that this was "wholly immaterial" and overruled an offer of proof that such was the fact.

Perhaps today, this ruling standing alone would not be considered reversible error. We think it was, as the court cannot pass on the weight which juries will give testimony. It is, however, highly important in the light of the accumulation of rulings referred to.

Again, in the instructions, upon being called upon to state any objections to the court's charge, counsel called attention as a first objection to the fact that the court had instructed the jury that defendant would have

been negligent in the matter of the carcass if it was likely to frighten horses. Many witnesses conceded that horses would shy at a carcass. Few testified that they would shy to such an extent as to run away. Defendant asked that the court charge that, before the defendant could be held negligent, they must find that the carcass was an object, not only likely to frighten horses, but to frighten them to such an extent that they would run away. The court thereupon so charges the jury, and thus properly completes its charge, but only after *this proper correction urged by counsel is abruptly commented upon by the court as captious and unnecessary*, and the correction is made with the statement that it is mere duplication of what the court had already charged (Tr. p. 232).

Again, such statements made by the court in the presence of the jury, constituting comments on exceptions to the charge, cannot but prejudice the jury. Experience shows that a jury does not relish objections being made or corrections suggested to the court's charge. It is bad enough that such objections must be made in the presence of the jury. The court's comments upon such objections should, in the presence of the jury, be made only with a proper recognition of the delicacy of the situation. Certainly at such a time reflections upon such objections are prejudicial in fact.

Lastly, at the very close of the trial, defendant called the attention of the court to what the defendant conceived was improper conduct

throughout the trial, which might have affected the jury. We think the exception thus taken had abundant merit, but, in spite of the fact that it was couched in language entirely respectful, even deferential, the *court declined to recognize that even the slightest possibility* existed that the matters which we have reviewed could have affected the jury, *and merely remarks* again harshly that *the defendant is privileged to take such exceptions as it pleases,* and the court at no time indicates to the jury that they should not misunderstand anything in the action of the court, if it seemed to them that the court's action was prejudicial.

II

SPECIFICATIONS OF ERROR.

I—A

It was error in the court to overrule defendant's motion to strike certain portions and the whole of plaintiff's First Amended Complaint (Tr. p. 2-6; 36-42).

I—B

It was error in the court to overrule defendant's motion to strike certain portions and the whole of plaintiff's Second Amended Complaint (Tr. p. 45-57).

II—A

It was error in the court to overrule defendant's demurrer to the Second Amended Complaint herein, and it was error in the court to refuse defendant's request for an instruction to

return a verdict for the defendant (Tr. p. 14-15; p. 201).

III—C

It was error in the court to refuse defendant's requested instruction numbered 2C, as follows:

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers, or by the exercise of reasonable diligence might have discovered the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance" (Tr. p. 203-207).

III—E

It was error in the court to refuse defendant's requested instruction numbered 2E as follows:

"No. 2E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless, you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees, knew, or discovered, or in the exercise of reasonable care should have known or discovered said negligence, if any, of said defendant and had the last clear chance to avoid the same and negligently failed to

avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering or having the means of discovering that another has been negligent entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another and if he does so, it is, in law, his own act or omission and not the negligence of the defendant which is the proximate cause of the injury" (Tr. p. 203-207).

IV—A

It was error in the court to charge the jury as follows:

"Defendant furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to the injury, and without it the injury would not have happened.

"Now at this point comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow, and, in reference to that, all the court has heard in the way of evidence is that Bigelow had been drinking that day.

"Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety. In other words, even though the defendant was negligent in leaving the carcass there, and even though it frightened the team, yet if Bigelow had driven with ordinary care and thus prevented the accident, then his negligence contributed to the injury. Unless you find by a preponderance of the evidence that he did not so drive, why,

you put the question of contributory negligence out of sight." (Tr. p. 216, 223-225).

IV—B

It was error in the court in its charge to rule that the doctrine of the last chance had no application to this case and to limit the issue of contributory negligence to the method of driving, and to instruct the jury that other matters of contributory negligence, such as the duty of the deceased not to thrust herself upon defendant's negligence, might be laid aside, and not to charge that the deceased had no right to thrust herself upon the negligence of the defendant, as the answer pleads, and the proof shows that whatever dangers existed the deceased and her agents knew of them, or had the last clear chance, by the exercise of reasonable care, to avoid them.

IV—C

It was error in the court to overrule the following exception and objection to the court's charge:

"We except further on the ground that the instructions do not cover all of the issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

"Your Honor has limited the issue of con-

tributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the court charges the jury that the last clear chance doctrine as regards the plaintiff's negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

"By the Court:—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted" (Tr. p. 234-235).

V—B

It was error in the court to refuse defendant's requested instruction numbered 4B, as follows:

"No. 4B. The railway company was not, in any event under any absolute duty to remove the carcass in question, if you find that the carcass caused the runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass or to exercise reasonable care to give warning of the dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning" (Tr. p. 208).

VI—B

It was error in the court to instruct the jury that the way in question was treated by all parties as a public highway, and not to define

the measure of responsibility in the event that the jury should find that the way in question was merely a way by invitation.

VII—A

It was error in the court to charge the jury as follows:

"Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant's railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not, in so allowing it to remain there, the defendant was negligent.

"In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the traveled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of ordinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances" (Tr. p. 216 and 219).

VII—B

It was error in the court to instruct the jury that the railway company placed the carcass near the roadway, if the horse was killed by being struck by a train and thrown there, irrespective of whether or not the railway company was negligent in the operation of the train, and

without proof of any act of the railway company justifying the submission of such an issue as to the placing of the carcass.

VII—C

It was error in the court to overrule the following objection and exception to the court's charge, to-wit:

"In regard to the placing of the carcass, your Honor has instructed the jury that, if the carcass was placed there by being struck by a train that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, and there is no proof of such a fact. We also except on the ground that we should not be liable for the placing of the animal unless we were negligent in the placing in the first place; that is, unless it amounts to negligence in the operation of the train that struck it" (Tr. p. 234).

VIII—B

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (William Gardner) that the driver Bigelow was at all times prior to the accident addicted to the habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of excessive use of liquor, sufficient to make dull his senses whenever, prior to the accident, he came to Bainville at any time prior thereto six months before the accident" (Tr. p. 136).

VIII—C

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on

the stand (Charles Hubener) that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during the said period to give Bigelow a share in the business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him because the witness had observed that he was an habitual drunkard" (Tr. p. 239).

IX—B

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that shortly after the accident, the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony" (Tr. p. 143).

IX—A

It was error in the court to deny the defendant the right to withdraw its disclaimer of any intention to impeach the witness Bigelow and to permit the plaintiffs to read into the evidence the following question propounded to, and the following answer given by, the witness Bigelow:

"Q. Did you ever, at any time or at any place, make any statement to anyone to the effect that this runaway had been caused by the horses becoming frightened at a piece of paper and not by the carcass?"

"A. No, sir." (Tr. p. 93.)

IX—C

It was error in the court to overrule the following objection to the admission of the testimony of the witness Bigelow on the former trial, and to admit said testimony:

"We object to the admission of the testimony of the witness Bigelow, taken on the former trial, because the transcript of his testimony constitutes mere hearsay, and the witness Bigelow himself must be called, and the inability to call him has not been sufficiently established, and because at the time Bigelow was examined at the time of the last trial, we did not have impeaching testimony, and we examined him at the last trial for the purpose of ascertaining if there was any impeaching testimony available, but since then we have secured impeaching testimony" (Tr. p. 281).

X—B

It was error in the court to permit the plaintiffs to read in evidence the following questions and answers in the cross-examination of the witness, Mrs. Charles Allison:

"Q. Did Mrs. Ennis say anything to you at that time about his having had any liquor, or anything like that?"

"A. No, she did not."

"Q. Did she say anything after the accident about him having had any liquor?"

"A. No, sir."

"To which questions and answers the defendant objected, on the ground that it had waived the cross-examination, and therefore none of the cross-examination should be read in evidence, and in so far as the same is admitted as cross-examination, it is a cross-examination as to a matter concerning which the defendant was forced to enter, by reason of the improper

questions asked in the direct examination, in regard to the declaration of Mrs. Ennis, there being, at the time the deposition was taken, no one present who could rule on the competency of said testimony, and said questions in cross-examination were asked merely for the purpose of developing anything that is pretended to have been said by Mrs. Ennis, we thus seeking to sound the reliability of the witness' testimony as regards the alleged conversation, and the same is hearsay, incompetent and irrelevant" (Tr. p. 102, 199).

X—D

It was error in the court to permit the plaintiffs to read in evidence the following question and answer in the cross-examination of the witness Mrs. Charles Allison, and to overrule the defendant's objection thereto, as follows:

"Q. And during those conversations did she say anything about Mr. Bigelow having been drinking that day?"

Which said question was objected to for the reasons set forth in the Assignment X-B.

"A. No, sir, she did not." (Tr. p. 103).

XII

The court was guilty of irregularities and abused its discretion in the course of the trial, whereby the defendant was prevented from having a fair trial, as follows:

"1. On the matters resting generally and as separate rulings in the discretion of the court, and on matters not of themselves separately assignable as errors the court ruled so frequently adversely to the defendant that though such rulings, as separate rulings, are not assignable as errors, the defendant was, by the

number thereof, unduly hampered in the examination of witnesses and prejudiced in the eyes of the jury.

"2. The court unduly, unnecessarily, improperly, frequently and without justification, restricted defendant in the examination of witnesses and prevented defendant from fully presenting the testimony favorable to the defendant, and material, competent and relevant to its defenses.

"3. The court unwittingly ridiculed before the jury defendant's defense that the driver Bigelow, referred to in the testimony, was under the influence of intoxicating liquor at the times complained of; the defense that the carcass did not give forth odor, and did not cause the runaway; the defense that the driver Bigelow had the last clear chance to avoid defendant's negligence, if any, and every defense interposed by defendant by statements made by the court in the trial, first excluding testimony in support of these defenses, and by afterwards permitting some of such testimony to be received, accompanied by comments by the court, adverse to such testimony, and otherwise causing the jury to believe that the defendant's competent, and relevant testimony was not such, and was admitted merely by the indulgence of the court, and ought not and would not be considered by the jury, as affecting the case.

"4. The court in the trial permitted itself to assume, or appear to assume, a repeatedly harsh, hostile and prejudiced manner towards defendant, its witnesses and its counsel, whereby defendant was hampered in the examination of witnesses and prejudiced in the eyes of the jury.

"5. In other respects, the court was guilty of irregularities, and of abuse of discretion."

III

ARGUMENT.

(A)

Plaintiff's Effort to Repudiate Election Made.

When plaintiff alleged in his first complaint that the road in question was a public highway, and the court ruled at the previous trial that the plaintiff could not recover unless he proved that the road in question was a public highway and that the evidence up to that time was not sufficient for that purpose, plaintiff had two courses open: First, he could have excepted to the court's ruling, completed all of his proof and taken a judgment of non-suit, and then had the ruling reviewed if he desired; or Second, he could have accepted and abided by the ruling of the court and been governed accordingly, amending his pleadings and taking a continuance, because of the changed issues.

He elected to pursue the latter course, and accordingly, not excepting to, and, on the contrary, accepting the ruling of the court, and seeking to obtain the advantage of avoiding a non-suit, the plaintiff applies to the court for leave to file an amended complaint expressly striking out and abandoning the allegations that the roadway in question was a public highway. Manifestly this formal election to pursue the case on the theory of an invited way, and this formal acceptance of the benefits thereby arising in avoiding a non-suit, constituted a bar to any

return to the theory that the road was a public highway.

Otherwise there never would be an end to litigation.

At the previous hearing the plaintiff sought to prove the road a public highway and the defendant was prepared to disprove it, and the plaintiff formally advised the court that he was unable to prove this, and, to get the advantage of avoiding a non-suit, he advised the court that he desires to proceed to prove that the way is a licensed way, but he cannot both take the benefit of such an election, and afterwards repudiate it when he finds that such second election does not authorize a recovery.

In support of the proposition that the prior proceeding taken in this litigation estops the plaintiff from his present course, analogous to an election of remedies or the estoppel of a former judgment, we cite the following authorities:

16 Cyc. page 787 and 796, Sub. Estoppel.

Quasi Estoppel: Acceptance of Benefits:—Where one having the right to accept or reject a transaction takes and receives benefits thereunder he becomes bound by the transaction and cannot avoid its obligations or effect by taking a position inconsistent therewith.

Prior Claim or Position in Judicial Proceedings:—A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.

Valdes v. Central Altogracia, 225 U. S. 58; 32 Sup. Ct. 664, at 670; 56 L. Ed. 980.

Davis v. Wakelee, 156 U. S. 680; 15 Sup. Ct. 555, at 558; 39 L. Ed. 578.

Robb v. Vos, 155 U. S. 13; 15 Sup. Ct. 4, at 13; 39 L. Ed. 52.

McSweeney Packing Co. v. Beshlin, 211 Fed. 922, at 924.

McNeil v. McNeil, 170 Fed. 289, at 290-291; 95 C. C. A. 485.

Shakelton v. Baggsley, 170 Fed. 57, at 59; 95 C. C. A. 485.

Therefore, the motions to strike portions of the first and second amended complaints, notwithstanding the disclaimer of counsel then made, should have been sustained, and the court erred in submitting the cause on the basis of the roadway being a public highway by estoppel, and in not submitting the cause on the basis of the roadway being a mere invited or licensed way.

(B)

No Negligence of Defendant.

We contend that the proof fails to show that there was any negligence on the part of defendant, because wherever recovery is allowed in this kind of case, the proof must show that the object complained of was an object, not merely likely to frighten horses generally, but that it was likely to frighten horses of ordinary gentleness, and then to such an extent as to cause them to run away.

Secondly, the proof showed that the carcass was between the road fences and thus on a part of the roadway (Tr. p. 267), and therefore, on

the theory that the road was a public highway, if it was such for one purpose, it was such for all purposes, and the county, and not the defendant, would be liable for the condition of the highway, unless defendant was at fault in the original placing of the carcass, as to which fault there was no proof.

As regards the first defect above noted, it is true that the plaintiff's proof was to the effect that the horses in question were frightened by this carcass and ran away, and that he thought they were gentle horses, but proof that in a particular instance, especially an instance of this kind, where an alleged gentle team, after having been scared by a piece of paper but a moment before, as is admitted, ran away, is not proof that the carcass is apt or likely in other instances to frighten horses of ordinary gentleness so that they will run away. The proof that in a single instance an alleged gentle team was frightened is not proof that this is the ordinary or apt, or likely effect of the article on horses of ordinary gentleness.

Plaintiff himself testified that he was an expert horseman and that, before the runaway he did not warn his wife of the presence of the carcass, and that if he had thought it an object likely to frighten the horses to such an extent that they would run away he would have warned her (Tr. p. 74).

All of the plaintiff's proof on the effect of the carcass will be found on the following pages of the transcript: 67-69, 74-77, 84-89, 99, 100,

104, 106-108; 114-116, 137, 138, 144, 154, 161-162, 177, 179-180, 194.

A careful reading will disclose it is indefinite, and amounts to no more than a statement that anything may possibly scare any horse, and that "horses" shy at a carcass, and may run away, though none of the witnesses ever heard of such an instance before (Tr. p. 116), and as to whether such a familiar object as a carcass is apt to frighten horses of ordinary gentleness so that they will run away, no attempt is made to meet such an issue. Because of this want of allegation in the proof, the complaint, as well as the proof was fatally defective.

No. Ala. Ry. Co. v. Sides, 26 So. 116.
Kumba v. Gilham, 79 N. W. 325.
Witham v. Bangor R. Co. 52 Atl. 764.
Patmonde v. N. Y. N. H. & H. R. Co. 61 N. E. 813.

In the second place, the proof showed that the carcass lay between the railroad wing fences extending from the outer right of way line and the track, and therefore on the land claimed to be a part of the public highway (Tr. p. 67, 100, 103, 126, 128). There was no proof as to how it got there, except that trains passed in the night and the section foreman had directed someone to report that it was killed by the railroad, though he did not himself know (Tr. p. 74, 126-127). But even assuming that it was killed by collision with a train, there was nothing showing that defendant was negligent in the operation of its trains, or in the killing of the

animals, not to mention that someone may have forced the animal on the track ahead of an oncoming train. It is probable that the animal may have simply wandered along the public highway and been struck by the train as an unavoidable accident.

There was no proof on this, and hence there was no proof that defendant was guilty of any fault in the original placing of the carcass there, and clearly, if the animal was struck by a train and thrown into the highway without any fault of the defendant, the defendant was not responsible for the alleged nuisance, and, it being within the highway, was under no obligation to clean the highway of articles found there, not as the result of any wilful placing or of any negligent act of the defendant in the operation of its trains: if the road was a highway for one purpose, it was such for all purposes, and the county alone or the owner of the animal for negligently allowing it to run at large, and not the railroad, would be under a duty to remove the carcass.

It is fair to ask the plaintiff to cite some authority to the effect that one whose negligence is not shown to have contributed to the creation of a nuisance on a highway can thus, without fault on its part, be placed in fault for not abating that which has arisen without its fault.

(C)

Defendant's Negligence Not a Legal Cause.

To the defense that for months before the accident the plaintiff knew of whatever condi-

tions existed there and did nothing whatever to avoid defendant's supposed negligence, we especially invite the court's attention. Defendant's proof shows contributory negligence on the part of the plaintiff. It also shows that defendant's negligence was not a cause of the accident, but a mere prior surrounding condition, for it is a general principle of law that where one person has been negligent, and another discovers that negligence and has the last clear chance to avoid the consequences, then such prior negligence, whether of a defendant or of a plaintiff, ceases to be a legal or proximate cause of the accident, and is rather a mere condition.

This rule finds illustration today more frequently when a plaintiff is guilty of negligence which the defendant, however, has the last clear chance to avoid, but examples are not wanting where the reverse situation has arisen. Indeed, the rule that the plaintiff, discovering defendant's negligence, cannot thrust himself upon it, is older than the former illustration of the last clear chance doctrine, so often appealed to by plaintiffs.

Thus the famous case of Davies v. Mann, 10 M. & W. 546, the earliest enunciation of the last clear chance doctrine, as applied to relieve the plaintiff of his negligence, is itself expressly based on the earlier and equally famous case of Butterfield v. Forester, 11 East 60, holding that where defendant is negligent, but the plaintiff, discovering it, has the last clear chance to avoid

that negligence, the plaintiff's own negligence is the immediate and proximate cause, and he cannot recover.

Now let us ascertain to what extent the proof shows that the present case is within this well settled doctrine. In fact, the law here is not disputed. It is simply the application of the proof to the law.

The proof showed that the carcass was first seen by the plaintiff himself at the place in question in the December preceding April 18th, the day on which the accident happened, and he, during January, February, March and April, had frequent occasions to drive from his ranch over the crossing to Bainville, and noticed the carcass and whatever effect it had on horses (Tr. p. 67, 68, 74). The driver in question had been in the plaintiff's employ on the ranch and knew all about the location of the carcass and its effect upon horses (Tr. p. 84, 87-88) and the plaintiff, at first denying it at this trial, admitted the truth of his testimony at a previous preliminary hearing, that he and the driver had discussed the location of the carcass and its effect upon the horses (Tr. p. 75-76). Everybody had seen the carcass (Tr. p. 99-100, 114-120).

So, as a first important fact, it is undisputed that *the plaintiff and the driver*, each of whom were *expert horsemen, for weeks and even months had known* of the presence of the carcass and its effect upon horses. Surely, as expert horsemen, they can be held to such

knowledge in the premises, as they say a railroad company should have known.

Notice also that in the complaint finally filed, plaintiff realizing this to be necessary to his recovery, expressly charges that he did not know the carcass would cause a runaway (Tr. p. 12). This allegation was inserted adversedly but was utterly disproved; he at least knew what the railroad company would know.

Notice next that it is not a case where a person driving along a road for the first time passes a dangerous object and is thereby entrapped.

Moreover it is *not even* a case where, *passing an object safely for the first time*, a person is under the necessity of returning the same way, and therefore necessarily passes it again. Here is a case where for months the plaintiff and the driver had been up and down the road over this crossing and knew of the conditions.

Again, it is *not* a case where *the defendant* would have peculiar knowledge of the existence of the object and of its dangers; *on the contrary*, it is a case where *the plaintiff*, as has been shown, and will be further shown, *had peculiar knowledge of* the existence of the carcass, and as expert horsemen (Tr. p. 69, 82) he and his driver would be in a better situation than the defendant to appreciate the supposed dangers and what should be done.

Still again, it is not a case of a person who comes in contact with an object in the course of driving along a highway in the course of a

journey of some length. *This carcass was right at the plaintiff's own door.* The Hanson and Ennis ranches on the northerly or easterly side of the track were not divided by any fences. They were practically one and the same ranch (Tr. p. 122). Accordingly we find (Exhibit 1) that after coming from Bainville the road ends at the track and is then planked across the track and then runs abruptly into the joint gate of the Hanson and Ennis ranches, probably one hundred feet from the track (Tr. p. 71, 114), and plaintiff's house was about 150 rods from the crossing (Tr. p. 62).

So, if the runaway was not caused by the driver's condition and contributory negligence, or if it was anything other than a plain accident, the same obligation which the plaintiff says rested upon the Railway Company to remove the carcass would require him and the driver, in the exercise of reasonable care, to avoid defendant's discovered negligence, to *get a pick or a shovel from the ranch and remove or bury the carcass*, thus said to threaten not only their own safety, but the safety of all persons on the highway.

So we emphasize that the dangerous object was not encountered by the traveler, merely in the course of a journey along the highway. *It was on the highway right at the very gate of the persons who are here saying that the railway company was at fault.*

Still further we note that the evidence of the plaintiff himself showed that *he saw* that the *defendant had attempted to do* what it consider-

ed necessary in the premises (Tr. p. 67). The carcass was burned once, but not very well, and then two more attempts were made by the defendant to burn it (Tr. p. 67, 120-121, 188, 190). Moreover dogs and coyotes had later so eaten it up that it was practically gone (Tr. p. 68, 69, 104, 117, 125).

Clearly plaintiff saw that defendant had done what it conceived necessary in the premises and yet *the plaintiff makes no complaint or suggestions to* the defendant (Tr. p. 75), although he knew the section foreman well, and also the roadmaster and agent (Tr. p. 67, 73, 80), and the section foreman was daily up and down the railroad which extended right past the plaintiff's house (Tr. p. 62), and the station at Bainville at its then new location (New Bainville) was but a few feet westerly of the crossing, where also plaintiff was acquainted with defendant's agent (Tr. p. 73).

So it is a case where plaintiff as an expert horseman knows the conditions and what should be done, and seeing defendant's alleged negligence, and alleged negligent attempts or failures, makes no complaint, and gives no suggestions, but thrusts himself on defendant's negligence.

The proof also showed that *there was another road* from town to the ranch, this road being but two and one-half miles longer than the one taken—surely not an extraordinary journey to avoid conditions which plaintiff and the driver, as expert horsemen, claimed threatened death. At least such a trip would not be inconvenient

until such a time as they would make up for their own neglect in not complaining to defendant's many available representatives, or in not themselves removing or burying the carcass, a condition which indeed, if as threatening as they allege it to be, humanity alone, and a regard for the safety of the community, would have prompted them to abate.

It is true that the plaintiff said that the other road involved a trip of six miles which he later cut down to four or five miles, but when confronted with his former testimony, he admitted that it was but about two and one-half miles longer (Tr. p. 72-73).

A prettier illustration of the duty of a party not to cast himself upon the negligence of another could hardly arise. We contend, therefore, that the court should have granted our motion for a non-suit and our request for a directed verdict on this ground. At least our requested instructions, numbered II-A to II-F should have been given, but the court ruled that should have been given, but THE COURT RULED THAT THIS WAS NOT EVEN A QUESTION OF FACT FOR THE JURY, and overruled our objections to the instructions because of this ruling, and because of the failure to instruct the jury on this issue.

The authorities on the principles applicable here are mountain high (See notes 28 Cyc 1418, 1422-30, 1510-14; 37 Cyc 295-298, 314-315; 29 Cyc. 515, where there must be a thousand cases collected). We have read a great many of these

cases. They illustrate the absolute impossibility of "case law" being a practical assistance to lawyers or courts, where the decisions are merely valuable because of their number and, the principle being conceded, they contain no valuable discussion.

From these decisions both the plaintiff and the defendant will concede the following principles: (1) That a plaintiff knowing of a defendant's negligence must not thrust himself upon it, but must exercise reasonable care to avoid it; (2) mere knowledge of a defect or obstruction in a highway is not always enough to establish contributary negligence as a matter of law in a person who attempts to pass it; (3) whether a person is negligent in attempting to pass a known obstruction, or in not avoiding it, is ordinarily a question of fact for the jury, and (4) where the facts are undisputed the Court may determine the issue.

Where the parties differ is this, and only this: The plaintiff will contend that the Court was right in holding that the case was in the fourth subdivision in the sense that there was no evidence that plaintiff could by the exercise of ordinary care have avoided the injury; the defendant, on the other hand, agreeing that the case is in the fourth subdivision, points out that the evidence showed, not only (a) that the plaintiff knew of the defect, and (b) appreciated the risks, but also (1) the following facts distinguishing the case from others where plaintiff's negligence has been submitted to the jury; (2)

that plaintiff had known of the existence of the carcass for months; (3) that the dangers, if any flowing from it would be peculiarly familiar only to horsemen like himself, if to anyone, and would not ordinarily be known to defendant railway company, or anyone other than horsemen; (4) that he knew defendant's representatives had attempted to do what seemed sufficient; (5) that he made no complaint to them of the condition generally, or of their inadequate handling of the situation, and lastly (6) that the carcass was right at his own door and could easily have been removed by him, with a shovel or team. By reason of these six facts defendant contends (a) that under the disputed evidence as to the horses being "as gentle as kittens," on the one hand, or "a nervous, high-strung team," on the other, it was at least for the jury to say whether the plaintiff should have used the road at all or whether he should have used the other road, or himself abated the alleged nuisance, or advised defendant, from his experienced judgment in the handling of horses, as to the alleged probable consequence of its failure, in its several attempts, adequately to meet the situation. Indeed (b), under this evidence, the issue of contributory negligense was established as a matter of law. We quote from

Dist. of Columbia v. Moulton, 182 U. S. 576; 21 S. Ct. 840; 45 L. Ed. 1237:

"***it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view of the obstruction itself in time to avoid

it without injury amounts to notice. In other words, as stated by the Maine court, 'no one needs notice of what he already knows,' and 'knowledge of the danger is equivalent to prior notice.' 91 Me. 296, 39 Atl. 1000. That the plaintiff had notice of the presence of the roller on the Park street in ample time to have avoided it is undisputed. When he turned from Fourteenth street into Park street it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the District to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—htat the District was under no obligation to restrain the plaintiff from attempting to pass, either by closing Park street or by other means. The District was not bound to presume that it would be necessarily hazardous to attempt to drive past the roller, stationary and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. *The District, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would evitably do so. It was bound to give sufficient warning to drivers of the presence of the roller in time to enable them to avoid passing it, if desired.* The District, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being lawfully on the street, the District was not bound to guard against the consequences of a voluntary attempt to drive by this roller. *Certainly if a*

driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the District ought not to be charged with notice that the attempt would be dangerous either to life or limb."

In that case the Supreme Court reversed the decision of the trial court submitting the issue af contributory negligence. A similar ruling should be made here. At least defendant was entitled to have the jury pass on the issue.

(D)

RULINGS ON EVIDENCE.

We will now consider the rulings on the evidence.

(*a*) *Habitual Excessive Use of Liquor by the Driver.*

The several written offers involve the right of the defendant to show that the driver, when intoxicating liquor was available, always habitually availed thereof, and used the same habitually for a period covering six months immediately prior to the accident, but all of these offers were rejected.

We must be brief. There is a conflict in the authorities as to whether habit in the use of intoxicating liquor is admissible to prove a person's condition at a particular time. Habit or disposition in many other matters is admissible to prove a fact. Common sense is to the effect that such evidence is admissible. Specific instances may not have any probative value, but habit or disposition is received by the mass of

mankind as very persuasive evidence in matters of this kind, and should not be excluded by any arbitrary rules of evidence.

Alcock v. Assur Co. 13 Q. B. 292.
Cosgrove v. Pitman 103 Cal. 269; 37 Pac. 232.
Pa. R. Co. v. Books 57 Pa. 339 at 343.
Huntington Etc. R. Co. v. Decker 82 Pa. 119.
M. K. & T. Ry. Co. v. Jones 75 S. W. 53 at 55.
McCandles v. McWha 25 Pa. 95.
M. K. & T. Ry. Co. v. Jones 75 S. W. 54 at 55.
Curtis v. Tacoma Car Whs. Co. 63 Atl. 400 73 N. H. 516.
Laeve v. M. K. & T. Ry. Co. 136 S. W. 1129 at 1131.
Smith's Executor v. Smith 67 Vt. 443, 32 Atl. 255.

However this may be, the case in question does not involve the use of mere habit as evidence. Here the defendant sought to show not only the habit of the driver when intoxicating liquor was available, but also that the liquor was available. When so coupled up the proof is proper. The following quotation from the case last cited clearly shows the court's error in this instance:

"It was error to say***that evidence touching the testator's habits of intoxication had no bearing upon the question of his condition at the time the will was executed. In the case of a man who is shown to have taken one drink and who has liquor at his command, an habitual lack of restraint in regard to it would increase the probability that he had taken more than could be directly proved, and so strengthen the probability that he was in the condition testified to by contestant's witnesses."

Moreover, in reading in evidence certain de-

positions, defendant waived the cross examination, and thereupon plaintiff read it. The cross examination thus became plaintiff's own proof and as the plaintiff elected to read also that part thereof relating to the habits of the driver, this became proof of plaintiff in his own case introduced at his instance and defendant was entitled to rebut it. Tr. p. 101, 110-113.)

(*b*) *The Driver's Inconsistent Statements.*

The driver testified that just before the time when he claims that the horses were frightened by the carcass, they had at the top of a hill on the approach to the crossing been frightened by a piece of paper. He admitted afterwards that this occurred near the bottom of the hill nearer to the carcass (Tr. p. 85, 89, 91-92). Defendant's proof showed that this was what caused the runaway (Tr. p. 164-176). Defendant sought to show that the driver made inconsistent statements to the effect that it was this paper, and not the carcass which caused the runaway (Tr. p. 134-135, 143, 163).

First, as regards the driver's testimony at the former trial being admitted at all. In accounting for his absence all that was shown was that he was, at the time of the trial, in Dakota, but nothing was done to show when he went there, or how long he would be there or efforts made to get him or why he was not served with a subpoena. This showing was not sufficient. The witness must be shown to be a non-resident

or absent in the sense of a permanent or indefinite absence.

State v. Banks, 31 So. 53.
Thompson v. State, 17 So. 512.
Hill v. Winston, 75 N. W. 1030.
South v. State, 6 So. 51.
Perry v. State, 6 So. 425.
Lucas v. State, 11 So. 216.
Shesson v. Burlington, 47 Ia. 302.

Moreover, we think, in the light of the driver's absence, that the rule of the statute in regard to impeachment was subject to a logical qualification, and that under such circumstances the witness may be impeached without any more definite foundation being laid.

So. Ry. Co. v. Williams, 21 So. 328 (dictum).
Cronkrite v. Trexler, 41 Atl. 22.
Hedge v. Clapp, 22 Conn. 266.
Kay v. Fredigal, 3 Pa. St. 221, 223.
McKee v. Jones, 6 Pa. St. 425, at 429.
Gaines v. Com. 50 Pa. St. 328.
Walden v. Finch, 70 Pa. St. 436.
Brubaker v. Taylor, 76 Pa. St. 83, at 87.
Dodgett v. Tolman, 8 Conn. 171, at 177.
Fletcher v. Henley, 13 La. (La.) Ann. 192.
Holman v. Bank, 12 Ala. 409.
Tucker v. Welsh, 17 Mass. 164.
Downer v. Dana, 19 Vt. 346.
Hazard v. Ry. Co., 2 R. I. 62.
Billings v. Ins. Co., 70 Vt. 477; 41 Atl. 516.

But in the light of changed conditions defendant was entitled to withdraw its disclaimer and upon its withdrawing its disclaimer, the testimony became incompetent. Indeed defendant was entitled as an absolute right to withdraw the question and answer. In 13 Cyc. Sub Depositions, page 985, it is said:

"A deposition may be good in part and bad in part. The party proposing to use it must use it only to prove that part which is competent for him to prove, and in introducing or reading it in evidence he may omit incompetent or irrelevant facts or statements therein contained and answers which are not responsive, and where part of the evidence is admissible it is error to reject the whole."

Indeed defendant had an absolute right to withdraw the question and answer as a part of the cross-examination. It was not directly connected with the remainder of the cross-examination or necessary to explain the preceding part. In such cases it is well settled that a party is not compelled to read in evidence all of his interrogatories and the answers thereto, but need read only all necessary to understand that part of the deposition which he asks to have read as to a certain issue. Many authorities are to the effect that a party is entitled to read such part of a deposition as he desires, leaving the other party to read the remaining part, but at any rate, whatever may be the rule in this respect, the matter in hand being an independent matter, not a part or a necessary explanation of the preceding cross-examination, defendant could certainly decline to read that part.

Bowen v. Durant, 140 N. W. 728.
Forbes v. Snyder, 94 Ill. 374 (see note 13 Cyc 985).
Sherrer v. Everest 168 Fed. 822 at 826.
Central Coal Co. v. Penny, 173 Fed. 340 at 346.
Crotty v Chicago Etc. R. Co., 169 Fed. 593 at 595.

First Nat'l Bank v. Elevator Co., 91 N. W. 436.
Guessner v. Hawks, 101 N. W. 893.
Water v. Sperry, 85 Atl 739, at 742.
Lanahan v. Lawton, 23 Atl. 476.
Watson v. St. Paul City R. Co., 79 N. W. 308.
Bank v. Rhusasel, 25 N. W. 261, at 262.

Plaintiff, however, was, under the above authorities, entitled, if it desired, to read in evidence any other competent portion of the cross examination, or incompetent, if not objected to the defendant, but in such case the part so read by the plaintiff becomes plaintiff's proof, competent or incompetent. Thus in Smith v. Bank, 26 N. W. 234, the court says:

"With reference to the objections taken to particular questions and answers, we think the proper rule is that when a party uses a deposition taken, but not used, by his opponent, he makes it his own, and his opponent has the same right of objection to the interrogatories and answers as respects matter and substance, as if the deposition had been taken by the party offering it in evidence."

Keller v. C. B. & Q., 111 N. W. 384.
McCutchen v. Jackson, 40 S. W. 177.
Reed v. Holloway, 127 S. W. 1189, at 1192.
Magee v. Paul, 159 S. W. 325, at 328.
Ches. Stone Co. v. Fossett, 100 S. W. 825.
Ry. Co. v. Ritter, 41 S. W. 753.
Doggett v. Green, 98 N. E. 219, at 220.
In re Smith, 26 N. W. 234.

As this testimony of the declarations of the driver thus became, not cross-examination by the defendant, but testimony of substance introduced at the instance of the plaintiff, the defendant was entitled, whether the same was com-

petent or incompetent, to rebut evidence thus constituting a part of the plaintiff's case.

Morgan v. State, 88 Ala. 223; 6 So. 761.
Mobile Elec. R. Co. v. Ladd, 92 Ala. 287; 9 So. 169.
McIntyre v. White, 124 Ala. 177; 26 So. 937.
Perkins v. Hayward, 124 Ind. 449; 24 N. E. 1033.
Nost v. Rosecrans, 66 Ia. 405, 407; 23 N. W. 895.
Spaulding v. R. Co., 98 Ia. 205; 67 N. W. 227.
Hamilton v. Co., 94 N. W. 282.
State v. Slack 69 Vt. 486; 38 Atl. 311.
Sisler v. Shaffer, 43 W. Va. 769; 28 S. E. 721.

In any event the declarations of the driver that it was a piece of paper and not the carcass, were admissible by the express provision of the statutes of Montana. Remember that these declarations are not the declarations of a mere eye-witness or bystander; they are the declarations of the plaintiff himself. The driver stood in the shoes of the plaintiff. *He was the sole active representative of the plaintiff's case, and his duty in the premises was in issue.*

In such a case, although it is well settled, of course, that the declarations of a bystander, whether an agent or not, made after the fact, are not admissible when not made in the course of his agency, our statutes clearly recognize that when the agent is the sole acting representative of the plaintiff's case, and his conduct is in issue, whatever would be evidence for or against him is evidence for or against the parties here.

Thus Section 7868 of the Revised Codes of Montana provides:

"Where a question in dispute between the parties is the obligation or *duty* of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties."

It will be observed that this statute is not limited to contract obligation. It includes cases of "duty" and clearly the duty of the driver as the sole responsible acting representative of the plaintiff's case was in issue here.

The previous sections of this statute recognize the hearsay rule and cover its exceptions. Really this section is but a part of three preceding sections.

Thus Section 7865 provides the general rule that the rights of a party are not affected by any declaration of a third person, and that such declarations cannot be received in evidence. This is the general recognition of the hearsay rule.

Then Section 7866 provides for the exception in cases of declarations by prior holders of title.

Then Section 7867 provides for the exception in the case of oral acts and the res gestae.

Then comes the section in question and this section is also followed by Section 7869 relating to the exceptions in cases of pedigree, and Section 7870 relating to declarations against a pecuniary interest.

The instant case comes within said Section 7868. The statute sensibly provides that declar-

ations by an agent such as the driver was in this case, the sole, acting representative of the plaintiff's case, though not made under oath, are sufficiently protected by the motive of the driver to protect himself, and if the admission is against interest, manifestly it is only because of the compelling truth of the facts. Indeed, with the exception of some cases not quite clear, and when confusion is removed, it is doubtful whether such evidence is not admissible at common law. At any rate the statute was conclusive.

The above theory was clearly advanced to the court, but the proof was denied (Tr. p. 133).

(C)

The testimony of the plaintiff's witness, Mrs. Charles Allison was taken by depósition before United States Commissioner, who had no right, of course, to rule upon the competency of the testimony adduced. Indeed, the stipulation expressly provided that objections should be made and ruled upon by the court (Tr. p. 200). When this deposition was taken the witness was asked in part in regard to conversations she had with Mrs. Ennis after the accident as to how it happened. Thereupon the defendant cross-examined the witness in this regard, and also sounded her recollection, the result of which was that she testified that in those conversations as to how the accident happened Mrs. Ennis made no complaint about the driver or any reference

showing his having used intoxicating liquor (Tr. p. 102-103).

Now, the court, on being called upon to rule, excluded the direct examination, but required this cross-examination to remain in the case over defendant's objection. The direct examination as to conversations having been stricken, the cross-examination in reference thereto went with it.

B. & O. R. Co. v. Dever, 75 Atl. 352 at 356.
Bertenshaw v. Laney, 94 Pac. 805 at 806.
McCutcheon v. Jackson, 40 S. W. 177.
Bentley v. Bentley's Estate, 101 N. W. 976.
Achilles v. Achilles, 28 N. E. 45 at 46.
Callison v. Smith, 20 Kas. 28.

Miscellaneous other rulings on evidence have been set forth in the outline as to the misconduct of the court.

(E)

MISCONDUCT OF THE COURT.

The conduct of the court at the trial has been reviewed necessarily we think at length. Indeed, it is this necessary review which has made this brief altogether too long. We complained of this conduct. We think the opinion filed illustrates and gives color to the cold, printed transcript. There are some portions of the opinion which we think no one would attempt to answer. We prefer merely to forget them, and in the preparation of this brief we have forgotten them.

No matter what the court may say or do, there is this difference between counsel and

the court. A finding of misconduct or a reflection upon counsel hits but a single individual, but a finding of misconduct or reflection against a judge is not, and cannot be merely personal to him. Counsel, therefore, in presenting such a charge, is required, we think, to bear in mind that a criticism against a particular judge, is a criticism going beyond him to the court itself. For this reason, we have endeavored in every instance, in presenting our contentions, to show the respect for the court which we have, and in characterizing the action of the court it will be noted that we have qualified our assertions by stating that they are our opinions as to what transpired, and when actions seemed particularly incomprehensible, we have endeavored to present them respectfully, but we trust that these qualifications, inserted by way of respect for the court, in the difficult task of reviewing an even disagreeable experience, will not be taken as an indication of any lack of abundant confidence in the merits of the contention that the court's action was throughout prejudicial to the defendant.

The citation of authorities is not valuable here. Each case must be considered on its merits. The views of the courts are set forth in 38 Cyc, 1316-1325, where the vast array of authorities are set forth, most of which, be it said to the credit of the courts, are to the effect that the instances are rare where any single example of misconduct has been held prejudicial error.

We know the fearful burden we undertake to discharge when we present this matter by a cold printed transcript. Although the court, in its opinion, we think, sets us an example of departing from the record, we have held ourselves to the very record itself.

The case is readily distinguishable from others. We have here a complaint, not as to a single ruling, or as to a single example of misconduct, but as to the entire course of the trial involving comments upon the evidence, the witnesses and defendant's counsel, comments upon defenses interposed, undue harsh restrictions on the examination, the apparent forcing of useless objections on the plaintiff, and the sustaining thereof to the embarrassment of the defendant, all of which, when finally respectfully challenged before the court and jury at the conclusion of the trial, is met by no correction of the court or indication to the jury that counsel has misunderstood the court. On the contrary, in the jury's presence, the court rather confirms them in the impressions which they had probably gained, and says in substance that if the court's actions have affected the jury, we are at liberty to attempt to make the most of it.

In nearly all cases the error of the court, if any, in such matters involves a single thoughtless remark made by the court, which on its being called to his attention, is met by a frank review of his action and a statement to the jury that counsel has misunderstood. Generally this

will cure most errors. We think it would scarcely cure (though it might have helped with the jury) the conduct here complained of, because a court cannot be hostile to a party throughout a trial and then later correct itself at the end.

We would call the court's attention to one very recent case where it has been held that a single unfortunate remark of the court may so poison the mind of the jury that even when corrected by the court the damage done is not repaired. Quirk vs. Consumers Co., 149 N. W.

(F)

DAMAGES.

All of the testimony on damages will be found on pages 61-62, 69-71, 77-78, and 80 of the transcript. It shows that the plaintiff necessarily spent more money in proper provision for his wife than the money loss sustained. Money loss and pecuniary loss are not entirely synonomous, but under the evidence the verdict is, as a matter of law, not merely excessive and indicating passion and prejudice, or a mistaken judgment on the part of the jury which could not be reviewed on appeal from the judgment; it is without evidence to support it and the judgment must therefore be reversed. The following authorities will show the views of the courts as to the measure of damages which cannot be sustained in these cases:

$3000 Long v. Union Rd. Co., 107 N. Y. S. 401.

$2500 Bond v. Atkinson, 9 Ohio Cir. Dec. 185.

$7000 Nelson v. Lake Shore Elec. R. C., 104 Mich. 582, 62 N. W. 993.
$5000 May v. West Jersey S. Ry. Co., 62 N. J. Law. 63; 42 Atl. 163.
$8000 Sherman v. West Stage Co., 24 Ia. 515.
$4000 Chicago Elec. R. Co. v. Goebel, 129 Ill. App. 152.
$5000 Glenn v. N. Y. C., 28 N. Y. S. 861.
$3500 McIntyre v. N. Y. C., 47 Barb. 513.
$10,000 Smith v. Lehigh Valley R. Co., 69 N. Y. S. 1112.
$3500 Oakes v. Me. Central, 95 Me. 103, 49 Atl. 418.
$3000 Ronson v. C. P. R., 18 Ont. Law. Rep. 337.
$1500 York v. Can, Atl. Steamship Co., 22 Can, Sup. Ct. 167.
$4000 Mitchell v. N .Y. C., 2 Hun. 535; 64 N. Y. 655.

Since the trial the plaintiff remarried, but the court ruled that this could not be considered as affecting damages. The weight of authority supports this view, but the ordinary lay judgment and the legislative declarations in compensation laws, including the Montana Workmen's Compensation Law, support the authorities to the effect that remarriage may be considered by the jury.

The Sagenaw, 139 Fed. 906 at p. 915.
Ry. Co. v. Kuehn, 8 W. 484 at 485.

The size of the verdict may also be considered in connection with the argument in reference to the effect of the misconduct of the Court.

Respectfully submitted,

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